

FILED  
U.S. Bankruptcy Court  
WDNC, Asheville, NC  
APR 12 2001  
Geraldine Treutelaar  
Crockett, Clerk  
/smr

JUDGEMENT ENTERED ON APR 12 2011

2. The debtors own their residence as tenants by the entirety. The schedules filed by the debtors value this residence at \$152,000. The residence is subject to the deeds of trust in favor of Advanta Mortgage Company for \$30,000 and Fleet Mortgage Company for \$113,000. The debtors' equity in their residence,

without any deduction for liquidation or other costs, is estimated to be \$9,000.

3. The female debtor claimed the entire equity in the residence as exempt pursuant to the N.C. Gen. Stat. § 1C-1601(a)(1) homestead exemption provided for by 11 U.S.C. § 522(b)(2)(A).

4. In addition, the male debtor claimed a "wildcard" exemption for ten shares of stock, a trailer, and two Tennessee Walking Horses totaling \$2,525.00.

5. The Trustee objected to the debtors' claimed objections. The Trustee asserts that when a husband and wife file a joint Chapter 7 petition under Title 11, neither spouse may *alone* claim as exempt the equity interest in the couple's homestead owned by them as tenants by the entirety. Instead, the Trustee asserts, both debtors must together elect the homestead exemption to be entitled to its protection. The consequence of the Trustee's argument is that neither debtor may then claim the "wildcard" exemption pursuant to North Carolina General Statute § 1C-1601(a)(2). This is because the amount of the "wildcard" exemption is reduced by the amount of equity claimed as exempt under § 1C-1601(a)(1).

#### Discussion

6. Upon the filing of a Chapter 7 bankruptcy petition, a bankruptcy estate is created. See 11 U.S.C. § 541 (a). The estate is composed of "all legal or equitable interests of the debtor in the property as of the commencement of the case." Id. The Chapter 7

estate includes property a debtor holds as a tenant by the entirety. See Sumy v. Schlossberg, 777 F.2d 921, 925 (4<sup>th</sup> Cir. 1985).

7. Certain interests of the debtor, however, are exempted from the Trustee's administration. Section 522(b) delineates two groups of exemptions a debtor may use--federal law exemptions under Section 522 (d) or state law and non-bankruptcy federal law exemptions.

8. North Carolina has "opted out" of the federal exemptions provided in Section 522(d) of the Code and only recognizes state law exemptions and non-bankruptcy federal law exemptions. See N.C. Gen. Stat § 1C-1601(f).

9. The North Carolina homestead exemption statute provides that

each individual, resident of this State, who is a debtor is entitled to retain free of the enforcement of the claims of creditors: (1) the debtor's aggregate interest, not to exceed ten-thousand dollars in value, in real property or personal property that the debtor or dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor owns as a residence, or in a burial plot for a debtor or dependent of the debtor.

See N.C. Gen. Stat. § 1C-1602(a)(1).

10. State law and not federal law determines the nature and extent of the debtor's interest in property. See Butner v. United States, 440 U.S. 48 (1979). Accordingly, to determine whether the Trustee has a valid objection to the female debtor's exemptions, the issue is whether the debtor has an "interest" in the entireties

property that is exemptible pursuant to N.C. Gen. Stat. § 1C-1601(a)(1).

11. The tenancy by entirety, recognized in North Carolina and most other states, is a legal fiction derived from the common law and existing only within the context of marriage. See Combs v. Combs, 273 N.C. 462, 160 S.E.2d 308 (1968). North Carolina General Statute § 39-13.6 provides that "a husband and wife shall have an equal right to the control, use, possession, rents, income, and profits of real property held by them in tenancy by the entirety. Neither spouse may bargain, sell, lease, mortgage, transfer, convey or in any manner encumber any property so held without the written joinder of the other person."

12. Unlike a joint tenancy or a tenancy-in-common, title to entirety property does not vest in either the husband or wife individually. Instead, title to entirety property, resting upon the legal fiction that husband and wife are but one entity in the eyes of the law, vests with the husband and wife as a marital entity. See generally Webster's Real Estate Law in North Carolina (5<sup>th</sup> Ed. 1999) § 7-16. Consequently, each spouse simultaneously owns and enjoys the entire estate, not an undivided share or moiety of the estate. See Davis v. Bass, 188 N.C. 200, 125 S.E. 566 (1924).

13. A split of authority exists over whether an individual debtor in a jointly filed case may alone exempt all of the equity in the entirety estate owned during coverture. See Himmelstein v.

Himmelstein, 203 B.R. 1009, 1016 (Bankr. M.D. Fla. 1996) (noting split). The court believes that the better reasoned approach is to allow the female debtor to claim as exempt the entire equity interest in the debtors' residential property.

14. This conclusion relies on the language of North Carolina General Statute 1C-1601(a)(1), which allows a debtor to exempt any "interest" in real property. This statute does not specify which types of interests are exemptible, but instead broadly exempts any type of property interest.

15. The case of In re Cain, 235 B.R. 812 (Bankr. M.D.N.C. 1998) is instructive. In that case, the Chapter 7 Trustee objected to the debtor's exemption election of a remainder interest in real property. Judge Stocks allowed the debtor to exempt this property interest, stating that "under the wording of the statute the debtor must own an interest in the real or personal property in which the exemption is claimed. There is no limitation or restriction in the statute regarding the nature or extent of the interest which must be owned." In re Cain, 235 B.R. at 816.

16. This case teaches that a debtor may exempt any property interest, regardless of its formal classification. In the case at bar, the debtor owns an inseverable interest in the whole entires estate during coverture. See Davis, 188 N.C. at 201, 125 S.E. at 168 (describing indivisible nature of entires estate). Under the broadly-worded North Carolina exemption regime, she may exempt this

interest which she holds concurrently and inseverably with her husband.

17. This court's holding is supported by the general principle that the exemption laws should be liberally construed in favor of the exemption. See Elmwood v. Elmwood, 295 N.C. 168, 185, 244 S.E.2d 668, 678 (1978) (stating that "exemptions, being remedial in their nature, . . . should always receive a liberal construction so as to embrace all persons coming fairly within the statute.") (citations omitted).

18. The court's ruling does not effect the rule that the Trustee may liquidate real property held as an entireties estate for the benefit of joint creditors with allowed unsecured claims. See Sumy v. Schlossberg, 777 F.2d 921 (4<sup>th</sup> Cir. 1985).

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:**

1. The Trustee's Objection to Claim of Exemptions is overruled; and

2. The female debtor is alone entitled to claim up to \$10,000 of the equity in the real property as exempt under the homestead exemption of N.C. Gen. Stat. § 1C-1601(a)(1); and the male debtor may claim exemptions pursuant to N.C. Gen. Stat. § 1C-1601(a)(2).

  
Dated as of date entered \_\_\_\_\_  
**George R. Hodges**  
**United States Bankruptcy Judge**